but that a sum recovered was taxable. The reasoning, however, is instructive and I think my view is consistent with it.

I have considered it necessary to state my opinion at some length because there must be scores of money-lenders who have written off portions of their re-valuation claims during the last year or two, so this case may be temporarily of some local importance and a brief judgment in a successful appeal is liable to make difficulties for those who have to deal with similar, though not identical, cases. Also, my great respect for the learned Judge with whom, on this occasion, I am unable to agree constrains me to state as clearly as I can the reasons for taking a different view.

I think that this appeal should be allowed and the assessment restored with costs, here and below.

Appeal allowed.

Re J. L. P. HARRIS, AN ADVOCATE & SOLICITOR.

[O. C. J. (Murray-Aynsley, C.J., Brown and Buttrose, JJ.) June 22, 1953]

[Singapore — Originating Summons No. 65 of 1953]

Advocates and Solicitors Ordinance, ss. 25 and 26D — Professional misconduct — What amounts to grossly improper conduct.

This case was concerned with the professional conduct of the respondent, an advocate and solicitor of this Court. The respondent was engaged in the defence in Police Court proceedings of a person charged with permitting another person to drive a car whilst not covered by the necessary insurance, under section 48 of the Road Traffic Ordinance. It appears that the respondent's client had permitted a serving soldier named Heyes to drive a car which did not belong to the client but which he used with the Owner's permission. The basis of the charge was that the permission of the owner did not extend to Heyes and that Heyes was not a licensed driver. Heyes was charged separately under the same section and also with other motoring offences. He was defended by an officer. The case of the respondent's client was fixed for hearing on March 20th and that of Heyes on March 21st. It appeared that the prosecution not unnaturally wanted the case of Heyes tried first. The respondent equally naturally wished to avoid this. In point of fact on the application of the officer defending, the case against Heyes was on the 21st postponed till April 4th. On March 20th when the client's case came on the prosecution asked for an adjournment because they wanted to call Heyes as a witness. The respondent opposed this application, pointing out that his client had arranged to go on leave on the day fixed for the hearing of the case of Heyes. Heyes was at this time on duty in the Federation. He had not been subpoenaed and it did not appear that any steps had been taken to secure his attendance. It appeared that the prosecution had expected they would have the adjournment asked for and in consequence did not have the other witnesses present. The Magistrate who was under the impression that a subpoena had been served on Heyes granted an adjournment but, in view of the coming departure of the client, only until March 25th. The respondent appeared to have considered this attempt by the prosecution as something underhand.

On March 25th, Heyes was brought to the Court by the respondent and left waiting in a parked motor car some distance away from the Court. When the case was called the respondent said that the case on March 20th had been adjourned because Heyes as a witness was not available. The respondent also said that even now Heyes had not been subpoenaed by the prosecution and that he was not wanted by them as a witness. But the prosecuting officer, replied that Heyes was wanted as a prosecution witness.

The Disciplinary Committee which inquired into the matter found that the respondent had been grossly guilty of improper conduct. He had deliberately arranged for Heyes to be kept out of the way of the prosecution.

Held: the respondent was guilty of grossly improper conduct and his conduct was entirely unworthy of a member of the Bar and he should be suspended from practice for three months and pay the costs of these proceedings.

ORIGINATING SUMMONS.

M. W. Maxwell for the applicants.

N. A. Mallal for the respondent.

Cur. Adv. Vult.

Murray-Aynsley, C.J. [delivering the judgment of the Court, stated the facts appearing in the 1st paragraph of the head-notes above, and continued]:— We consider that the prosecution were perfectly entitled to make the application, but they were certainly wrong in not having their witnesses available on the date fixed for trial. They should not have been surprised if the Magistrate had then and there dismissed the case. It is certain, however, that the respondent knew of the expressed intention of the prosecution to call Heyes. However undesirable it might be to call him before his own case had been disposed of, there was no reason in law why the prosecution should not call him, and if not a necessary witness he was obviously a very material one. We consider that the respondent was unjustified if he assumed that the prosecution had no genuine intention to call Heyes. Between the 20th and the 25th Heyes arrived in Singapore and appears to have been in charge of a Capt. Hoyle of the Singapore Base District. No subpoena was served on him, but Capt. Hoyle gave him informal directions as the result of telephone conversations with the police and with the respondent. Capt. Hoyle was responsible for getting Heyes to Court at the proper time and he regarded his duty as discharged by an arrangement made with the respondent over the telephone that Heyes would on the morning of the 25th visit the respondent's office and then accompany the respondent to Court.

Accordingly on the morning of the 25th Heyes arrived at the respondent's office. From there Heyes went to the neighbourhood of the Court in the respondent's car, but having arrived there he did not go to the witness room in the ordinary way, but at the

direction of the respondent remained in the latter's car at some distance from the Court. Whether this was done (as the respondent says) with the original intention of producing Heyes if the prosecution made a further application for adjournment, or whether it was done (as the Committee have found) deliberately to keep Heyes out of the way, seems to us to matter little. As a fact he kept him out of the way; and he continued to keep him out of the way after the prosecution (in answer to a question by him) had intimated that they wished to call him if they could find him. We do not think that the respondent did this in the expectation that in the absence of Heyes the charge would fail altogether. Heyes was only material on the charge so far as it was required to prove that he was driving and unlicensed. The prosecution had no difficulty in proving that Heyes was driving and there was evidence that when stopped by the police Heyes did not produce a driving licence. The defence was not run on the lines that the prosecution had failed to prove that Heyes was unlicensed but on the alleged fact that he had been issued at some time with a licence in Northern Rhodesia.

During the hearing the absence of Heyes was referred to by the prosecution. The statement was made that Heyes was absent and that he had gone to the respondent's office. The respondent was not asked directly where Heyes was, nor did the respondent give any information. The case for the prosecution was closed without Heyes being called. The respondent then made a submission which was not based in any way on the absence of Heyes but which appears to have been based on implied permission of the owner, a matter in which Heyes was not concerned, and on the granting of a licence to Heyes in Northern Rhodesia. In so far as there was anything in the latter part of the submission it would have been without substance unless Heyes were called as he was the only person who could have proved that such a licence had been issued. The submission was over-ruled and the defence called upon. The respondent thereupon asked for an adjournment "as he wanted to contact the witness Heyes himself. He had made arrangements to do so if necessary through his Commanding Officer."

To the Disciplinary Committee the respondent admitted (looking back) that he had not been sufficiently frank. To us it appears that the application was, to say the least, disingenuous. It was likely to cause the Magistrate to form an erroneous impression as to the facts regarding Heyes and it is impossible to avoid the conclusion that it was calculated to do so.

The Disciplinary Committee made the following findings of fact, and we make the following comments on their findings :—

1. "That the respondent knew that Heyes was wanted by the Crown as a witness against B."

The respondent knew that the prosecution had announced their intention of calling Heyes. The respondent was quite unjustified in acting as though they did not intend to call him.

2. "That the respondent undertook to bring Heyes to the Police Court."

Perhaps "undertook" is too strong a word. The respondent knew that Heyes was wanted there by the prosecution and that Capt. Hoyle relied on him to get Heyes there.

3. "That the respondent did not bring Heyes into the Court but instructed Heyes to wait in a motor car which was parked on the road a few yards from the Court house."

We think there is no comment to be made on this finding. The facts are not disputed.

4. "The respondent hoped that in the absence of Heyes the prosecution would not be able to prove their case against B. (In fact, at the close of the case for the prosecution the respondent submitted that he had no case to meet, but the Magistrate decided otherwise)."

We have examined the notes of evidence made by the Magistrate. As a result we do not consider that the respondent could have expected that the case would break down owing to the absence of Heyes. There is no doubt that the respondent acted as he did with the intention of preventing the prosecution from calling Heyes. We think that this was done more with the intention of annoying the police than with the intention or expectation of bringing about a miscarriage of justice.

5. "It was made perfectly clear to the respondent at the hearing on March 25th that the police were looking for Heyes, but he made no mention of the fact that he had instructed Heyes to wait nearby in a parked motor car."

We have no comment to make.

6. "When the Magistrate called B. for his defence the respondent asked for a short adjournment on the ground that he wished to contact Heyes. The respondent did not tell the Magistrate that Heyes had been available throughout the hearing. The respondent admitted to us that at the time he applied for a short adjournment it did not occur to him that he was not being frank with the Magistrate. The respondent admitted however that 'looking back now' he had not been sufficiently frank."

We have already made some comment on this part of the case.

"In conclusion, whilst we consider it is not incumbent on defending counsel to help the Prosecution to prove its case we express the opinion that defending counsel should not do any act or thing to obstruct or prevent the Prosecution from calling a witness. And we find that the respondent deliberately made arrangements for Heyes to be kept out of the way of the Prosecution and that in doing so he was guilty of grossly improper conduct.

We wish to record that we do not think the respondent fully realised that he was acting improperly or dishonourably and that he allowed his zeal for his client's interests to obfuscate his better instincts."

Although consideration of material in the shape of the notes of evidence which was not before the Committee, enables us to form a somewhat less serious view of the matter than the Committee in their finding of fact No. 4, we have no hesitation in accepting their view that the respondent was guilty of grossly improper conduct. We agree that probably the respondent did not realise at the time the gravity of his misconduct. We consider that his conduct was entirely unworthy of a member of the Bar and that it was irresponsible to a degree that cannot be passed over. Our order is

That John Lawrence Pool Harris be suspended from practice for three months and pay the costs of these proceedings.

We would add that the period of suspension would have been longer but for the delays that have occurred in the determination of this matter.

Respondent suspended.

PUBLIC PROSECUTOR v. H. PARNABY.

[A. Cr. J. (Bellamy, J.) July 22, 1953]

[Seremban — Criminal Appeal No. 5 of 1953]

Criminal Procedure Code (Cap. 6), ss. 173(h) and 174 — Amendment of charge — Duty of Magistrate.

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge under the Customs Enactment, 1936. It was argued on appeal inter alia: (1) at the close of the case for the prosecution the learned Magistrate should have acted under section 173(h) of the Criminal Procedure Code and should have amended the charge; (2) the learned Magistrate should have permitted the prosecution to reply to the point of law made by the Defence Counsel at the close of the case for the prosecution.

Held: (1) it would be imposing an intolerable burden on a Magistrate to ask him where the prosecution has after consideration amended a charge and elected to proceed to trial on it, to search the law for offences which the accused may have committed and that in this case the learned Magistrate had not failed in his duty under section 173 of the Criminal Procedure Code; (2) although in practice a Magistrate generally hears both sides on a submission of no case to meet at the close of the case for the prosecution he is not bound to do so.

Cases referred to:—

(1) *Kee Kim Chooi & Ors. v. Public Prosecutor* (1952) M.L.J. 180.

(2) *Public Prosecutor v. Ishak & Ors.* (1952) M.L.J. 151.

(3) *Public Prosecutor v. Beh Yew Suan* (1952) M.L.J. 225.

(4) *Public Prosecutor v. Heng You Nang* (1948) M.L.J 285.

(5) *Chow Kwan v. Public Prosecutor* (1934) M.L.J. 164; (1933 — 1934) F.M.S.L.R. 168.

CRIMINAL APPEAL.

L. A. Massie (Federal Counsel) for the appellant.

R. H. V. Rintoul for the respondent.

Bellamy, J. : — This appeal by the Public Prosecutor against the acquittal of the respondent comes before me in the following circumstances.

Upon a complaint sworn on 5th May, 1953 by Che Onn bin Abdullah, a Junior Customs Officer, Seremban, before the Magistrate at Seremban, the Magistrate issued a summons under section 114(i)(e) of the Customs Enactment, 1936 against one Ng Kim Lek, the manager of Messrs. Lee Kee & Co., wholesale and retail liquor dealers of 102 — 103, Birch Road, Seremban, to answer the following charge :—

"That you Ng Kim Lek on or about 3rd April, 1953 at about 3.15 p.m. in premises No. 102–103 Birch Road, Seremban, did knowingly have in your possession 84½ gallons of Carlsberg (NAAFI) Beer valued at $426.72 on which the Customs Duty leviable by law amounting to $439.40 has not been proved to have been paid and thereby committed an offence under section 114(i)(e) and punishable under section 114(i) of the Customs Enactment 5/36."

The Magistrate, upon the same sworn complaint and at the same time, issued a summons under section 119 and section 114(i)(e) of the Customs Enactment, 1936 against the respondent, a Regimental Sergeant-Major serving with the 13/18th Hussars in Seremban and the Warrant Officer in charge of the Sergeants' Mess at Paroi Camp, Seremban, to answer the following charge :—

"That you, Herbert Parnaby, of Paroi Camp, Seremban, at various unknown dates between the 1st day of December, 1952 and the 3rd day of April, 1953 did abet one Ng Kim Lek, the Licensee of Lee Kee & Co. of No. 102–103 Birch Road, Seremban, in the offence of being in possession of 84½ gallons of Carlsberg (NAAFI) Beer valued at $426.72 on which the Customs Import Duty leviable by Law amounting to $439.40 has not been proved to have been paid, whereby you have committed an offence under section 119 and section 114(i)(e) and punishable under section 114(i) of Customs Enactment No. 5/36."

On the return date of the summonses, 22nd May 1953, the said Ng Kim Lek and the respondent appeared before the Magistrate's Court at Seremban where the charges were read and explained to them. Both accused claimed to be tried. Upon the application of the prosecuting officer for an adjournment for six weeks on the ground of enabling the Government Chemist at Kuala Lumpur to complete his analysis of samples of the beer which had been sent to him for that purpose, the Magistrate postponed the cases for trial to 29th June, 1953. On 29th June, 1953 a new charge contrary to the sub-section already mentioned was substituted for the former charge against each of the accused. The amended charge against the said Ng Kim Lek was as follows :—